Supreme Court, U.S.
FILED
FEB 5 1997
CLERK

(13)

No. 96-243

In the

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF ON THE MERITS

WM. PATTERSON CASHILL
410 California Avenue
Reno, Nevada 89509
Telephone: (702) 334-4444

ROBIN L. RIVETT
*R. S. RADFORD
VICTOR J. WOLSKI
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Petitioner

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a final decision by respondent Tahoe Regional Planning Agency (TRPA), prohibiting petitioner Bernadine Suitum from causing any "new land coverage or other permanent land disturbance" on her residential subdivision lot. Joint Appendix (App.) 26. Although TRPA's ruling establishes with certainty the nature and extent of development that will be permitted on Mrs. Suitum's land (none), the Ninth Circuit Court of Appeals found that the agency had not reached a "final decision" within the meaning of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). Mrs. Suitum's regulatory takings claim was therefore found to be unripe, on the grounds that Mrs. Suitum was required to attempt to market certain administrative credits created by TRPA[1] and apply for the agency's approval of a sale of the credits to a third party. App. 160-63.

In response to Mrs. Suitum's brief on the merits to this Court, both TRPA and the amicus brief for the United States concede that Mrs. Suitum *has* in fact obtained a final decision within the meaning of *Williamson County*, but urge this Court to apply the earlier and more general ripeness doctrine of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Brief for Respondent (Resp. Brf.) at 18-25. Even if this Court were to accept this dubious invitation, Mrs. Suitum's claim is plainly ripe under the two-pronged standard of *Abbott Laboratories*. The only material dispute in the proceedings below was the value (if any) of TRPA's administrative credits. Since both parties have submitted evidence valuing these credits by ordinary appraisal methods, this controversy reduces to a factual dispute that is eminently fit for adjudication at trial. The second consideration under *Abbott Laboratories* is the hardship to the parties of withholding adjudication. This criterion also strongly favors Mrs. Suitum, an elderly widow who has already endured seven years of needless administrative and judicial delay, and whose legal claims may be foreclosed if she complies with the procedures required by the Ninth Circuit.

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[1] These credits are commonly but misleadingly referred to as "transferable development rights (TDRs)."

TRPA relies on *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), for the proposition that the resale value of its administrative credits "mitigates" the agency's liability for a taking. Resp. Brf. at 32-33. In fact, however, the "mitigating" effect of the TDRs at issue in *Penn Central* derived from the fact that they could actually be used by the plaintiff to facilitate more intensive development of its own surrounding property.[2] Here, TRPA's credits cannot restore or enhance any use of Mrs. Suitum's land, and their resale value is relevant, if at all, only to compensation.

Because the facts of this case fall squarely within the "categorical takings" doctrine of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court should remand with instructions that the only issue remaining for the trial court is determination of just compensation.

I

TRPA'S RETREAT FROM *WILLIAMSON COUNTY* TO *ABBOTT LABORATORIES* IS UNAVAILING

A. TRPA Now Admits It Has Reached a Final Decision Within the Meaning of *Williamson County's* Ripeness Doctrine

In its opposition to Mrs. Suitum's petition for certiorari TRPA maintained--as it did before both lower courts--that Mrs. Suitum's takings claim is not ripe because she has not yet obtained a "final decision" regarding how she will be allowed to develop her land as required by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. at 190.[3] Now, in its response to Mrs. Suitum's brief on the merits to this Court, TRPA has changed its position and admits that

> we *do* know how far the regulation has gone .... ***We know the full extent of the regulation's impact in restricting petitioner's development of her own land***.
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> . . . .

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[2] 438 U.S. at 137.

[3] *See* Brief in Opposition to Petition for Certiorari at 11-16.

> To be sure, in most contexts, no further steps would be necessary to develop the necessary factual record where, as has occurred in this case, the governmental agency ***has reached a final decision regarding the extent of development permitted on a particular piece of land***.

Resp. Brf. at 21, 31 (emphasis added).[4]

Since the ruling below by the Court of Appeals rested entirely on the assertion that TRPA had ***not*** reached a final decision under *Williamson County*,[5] and it therefore could ***not*** be determined "how far the regulation goes,"[6] TRPA's admission on this point would seem to be dispositive of the issues presented for review by this Court. However, TRPA abandons its *Williamson County* ripeness argument only to aver that Mrs. Suitum's claim is not ripe under *Abbott Laboratories v. Gardner*, 387 U.S. 136.[7]

Abbott Laboratories, a case dealing with preenforcement challenges to federal regulations under the Administrative Procedure Act (APA), was not mentioned by the court below and has no obvious applicability to takings claims arising from local land use regulations. Nevertheless, even if this Court were to apply the prudential ripeness doctrine of *Abbott Laboratories* to the case at bar, it would find Mrs. Suitum's takings claim ripe for adjudication.

B. Mrs. Suitum's Takings Claim Is Ripe for Adjudication Within the Meaning of *Abbott Laboratories*

In *Abbott Laboratories* this Court set forth two broad criteria for determining the ripeness of preenforcement challenges to federal regulations under the APA: the "fitness" of the issues for pre-enforcement adjudication and the hardship to the parties of

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[4] This admission is echoed by the amicus brief filed for the United States in support of TRPA: "Petitioner has ... satisfied the 'final decision' requirement, as applicable to the instant regulatory program." Brief for the United States at 24.

[5] *Suitum v. T.R.P.A.*, App. 160-63.

[6] *Id.* at 161.

[7] Resp. Brf. at 18-30; Brief for the United States at 24-27.

postponing judicial review.[8] Stretching these standards almost beyond recognition, TRPA argues that they favor postponing adjudication of Mrs. Suitum's takings claim until she complies with the Ninth Circuit's requirement of seeking out a buyer for TRPA's administrative credits and applying for the agency's approval of their sale. Resp. Brf. at 18-19.

1. Mrs. Suitum's Takings Claim Is Fit for Adjudication

In *Abbott Laboratories*, the plaintiffs' claim was found to be fit for adjudication because there had been a "final agency action" under the APA.[9] This criterion is the equivalent, in a land use context, of *Williamson County's* requirement of a "final decision" concerning the extent and nature of development that will be permitted on the plaintiff's land.[10] In the case at bar, TRPA has conceded that it has reached a final decision within the meaning of *Williamson County*. Resp. Brf. at 31. Thus, Mrs. Suitum's takings claim is fit for adjudication under either *Williamson County* or *Abbott Laboratories*.

TRPA's "unfitness" argument rests entirely on its assertion that the value of its administrative credits is unknown and must be determined by Mrs. Suitum via a market transaction before trial. Resp. Brf. at 22-25. TRPA acknowledges there is no dispute concerning the precise nature and extent of the credits it requires Mrs. Suitum to market, but argues that "the lower courts never had an opportunity" to consider whether the credits could be valued like any other asset, through ordinary appraisal methods. Resp. Brf. at 30. This is a puzzling claim, given that TRPA filed a sworn affidavit with the trial court purporting to value the very credits at issue in this case via normal appraisal methods. App. 93-94, 123-32.

Apparently plagued by doubts concerning the reliability of its own affidavit, TRPA now suggests it would be "prudent" for a court to demand "more reliable evidence" in the form of a market transaction negotiated by Mrs. Suitum. Resp. Brf. at 31. Greater reliability is supposedly needed because TRPA's administrative credits are "a newly created property right" whose market is not yet

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[8] 387 U.S. at 149.

[9] *Id.*

[10] 473 U.S. at 190.

"fully developed and settled." *Id.* at 31, 29. However, this characterization is hard to reconcile with the brief submitted by TRPA's amici Pete Wilson, *et al.*, explaining to this Court that "a large and varied marketplace" for TRPA's credits has developed over the past ten years[11] and there is now an "active private market in place" for the credits.[12] This, of course, was TRPA's position in the trial court when it proffered an appraisal of the purported market value of its credits.[13] TRPA's contorted efforts to keep one foot planted firmly on each side of this issue culminate in its plea that, although Mrs. Suitum must be required to negotiate a market sale of TRPA's credits before she is allowed to bring her suit, the trial court must not be bound by such evidence, *but should assign whatever value to the credits it finds appropriate!* Resp. Brf. at 27 n.18.

Cutting through the obfuscation, this much is clear: TRPA's administrative credits *have* been valued by ordinary appraisal methods by *both* sides, and those differing valuations were before the trial court. App. 161-63. This reduces the issue to a factual dispute. TRPA's position, in essence, is that *the existence of a factual dispute should bar Mrs. Suitum from going to trial.* On the contrary, Mrs. Suitum contends that resolving such disputes is the quintessential function of trial courts in the Anglo-American legal system, and her claim against TRPA is fit for adjudication.

2. Further Delaying the Adjudication of Her Takings Claim Would Impose Unconscionable Hardship on Mrs. Suitum

TRPA and its amici contend that further delaying Mrs. Suitum's access to the courts will "impose[] no hardship" and work no "undue

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[11] Brief of Amici Curiae Pete Wilson, *et al.* (Wilson Brf.), at 15.

[12] *Id.* at 16.

[13] App. 146-48 (describing the multitude of market sales that have allegedly been entered in TRPA's "daily log" of TDR transactions). *See also* Resp. Brf. at 11 ("[m]any owners of SEZ property have successfully obtained and sold" TDRs).

burden" on Mrs. Suitum. Resp. Brf. at 28 n.19, 25.[14] This claim is hard to credence.

Mrs. Suitum is an elderly woman in frail health who has already suffered through seven years of administrative and judicial delays since TRPA flatly denied her right to build her dreamed-of retirement home in a residential subdivision of Incline Village.[15] TRPA's continual delaying tactics are supported by effectively unlimited governmental resources, while Mrs. Suitum is a retired widow of modest personal means. Each additional day that TRPA can keep Mrs. Suitum from litigating her claim on the merits increases the disparity between the parties, to the agency's advantage.

The "hardship" criterion in *Abbott Laboratories* included consideration of legal liabilities the plaintiffs might incur through a denial of preenforcement review of the regulations in question.[16] In this sense too, Mrs. Suitum faces substantial hardship if she is forced to negotiate the procedures required by the court below to "ripen" her takings claim.

Article VI(j)(4) of the Tahoe Regional Planning Compact provides:

> A legal action arising ... out of the granting or denial of any permit, shall be commenced within sixty days after final action by the Agency.[17]

TRPA's final action denying Mrs. Suitum's permit application occurred on November 29, 1990, exactly 60 days prior to the filing of her complaint. App. 8, 1. Among the procedures TRPA now requires Mrs. Suitum to negotiate is to obtain and market a

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[14] *See also* Brief for the United States at 26 n.13 (the hardship of postponing adjudication has "fallen largely on respondent").

[15] *See* Minute Order Denying Joint Motion to Dismiss for Failure to Provide Discovery, Court Record (CR) 60 (discovery process delayed because of Mrs. Suitum's "age and infirmity").

[16] 387 U.S. at 153-54.

[17] *See, e.g., Bourne v. Tahoe Regional Planning Agency*, 829 F. Supp. 1203, 1206 (D. Nev. 1993). Note that triggering this statute does *not* require a "final decision" within the meaning of *Williamson County*. TRPA does not dispute that it has denied Mrs. Suitum's permit application. *See* Answer to Complaint, App. 8.

"Residential Allocation" that is distributed via a lottery held only once a year. App. 146. TRPA admits that Mrs. Suitum's chances of winning the lottery are at most one in five (App. 146-47), but encourages her to return year after year until she succeeds. Resp. Brf. at 11 n.8.[18] TRPA also admits that in 1993, the last year for which data appear in the record, no one was able to sell any of the awarded allocations during their 12-month lifespan. App. 147. Mrs. Suitum respectfully suggests that if she were to follow the procedures TRPA has proposed--entering and re-entering an annual lottery as many times as necessary until she obtains an allocation; spending another 12 months unsuccessfully searching for a buyer; and finally refiling her takings claim incorporating this evidence that TRPA's credits are worthless--TRPA would immediately move for dismissal under the 60-day statute of limitations!

Even if TRPA's statute of limitations defense were deemed waived, Mrs. Suitum has explained how compliance with the "ripeness" requirements set forth by the court below could deprive her of standing to bring her takings and due process claims, or render those claims moot.[19] In response, TRPA suggests that this Court should not be concerned with these consequences, since the harsh procedural requirements imposed by the Ninth Circuit are unlikely to be applied to litigants other than Mrs. Suitum:

> In the context of TDRs, there is no rigid ripeness requirement of final TRPA approval, let alone a requirement of a final, consummated sale. Although the lower courts, in response to petitioner's extreme and unsubstantiated factual allegations, stated that ***her*** claim would not be ripe until she had obtained TRPA's approval, we do not read those courts as having held that TRPA approval would be required ***in all cases*** for prudential ripeness.

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[18] TRPA seems to believe the odds of winning are affected by whether a given player participated in the previous year's drawing. Resp. Brf. at 11 n.8. In fact, the odds of winning the annual lottery would never "approach 100 percent," but would always remain 1 in 5 so long as 30 entries compete for 6 allocations.

[19] Petitioner's Brief on the Merits at 27-29.

Resp. Brf. at 27-28 (emphasis added). The sense of this passage seems to be that special burdens were imposed on Mrs. Suitum because she refused to acknowledge TRPA's authority to require her to market its arguably worthless credits. Viewed in this light the hardships imposed on Mrs. Suitum by the decision below must be interpreted as *punitive*, levied in retaliation for her unqualified assertion of her fundamental constitutional rights; a more compliant victim would not be subjected to such harsh procedural bars. If TRPA is correct in this interpretation, this must surely be added to the balance of equitable considerations favoring reversal by this Court.

II

PENN CENTRAL DOES NOT SUPPORT TRPA'S ARGUMENT THAT MRS. SUITUM'S TAKINGS CLAIM IS NOT RIPE FOR ADJUDICATION

TRPA expresses astonishment that Mrs. Suitum has not discussed *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, a decision that has little or no relevance to the issues presented by her case. Indeed, to the extent *Penn Central* can be read to have any bearing on Mrs. Suitum's takings claim, it strongly supports her position with regard to both the ripeness of her claim and its merits.

A. *Penn Central's* Takings Claim Was Not Barred on Ripeness Grounds

The most obvious distinction between *Penn Central* and the case at bar is that *Penn Central* was not decided on ripeness grounds. Despite the availability to the plaintiffs of unused and unvalued TDRs, Penn Central's taking claim was allowed to proceed on the merits. Thus, to the extent the availability of TDRs can be invoked to analogize *Penn Central* to the case at bar, the manner in which this Court resolved *Penn Central* supports Mrs. Suitum's argument that her case is ripe for adjudication on the merits.

B. Ruling on the Merits, This Court Found No Taking Occurred in *Penn Central* Because New York City's Application of Its Landmarks Preservation Law Permitted the Owners to Continue to Make Profitable Use of Their Land, Did Not Interfere with the Owners' Primary Expectations, and Substantially Advanced Legitimate State Interests

The Landmarks Preservation Law at issue in *Penn Central* differed from TRPA's regulatory scheme in several key respects. This Court's ruling on the merits that no taking occurred in *Penn Central* rested precisely upon these distinctions, *not* on the single point of similarity--that New York City's regulatory program, like TRPA's, happened to include the use of TDRs.

At the outset, the plaintiffs in *Penn Central* conceded that New York City's application of its landmarks law did not preclude their ability to earn a "reasonable return" on the property in question by operating a railway terminal, concessions, and office space on the site.[20] As the Court noted, this established that the regulations at issue did not interfere with Penn Central's "primary expectation concerning the use of the parcel."[21] In cases where the application of the law would deprive an owner of significant beneficial use of his property, a special permit could be sought on grounds of "insufficient return;" however the *Penn Central* plaintiffs did not qualify for or utilize this hardship procedure.[22] The plaintiffs also acknowledged that the application of the law to their property, Grand Central Terminal, bore what would now be called an "essential nexus" to the achievement of the law's legitimate objectives.[23] These concessions by the *Penn Central* plaintiffs--reflecting as they do a completely different fact situation from that confronting Mrs. Suitum--effectively

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[20] 438 U.S. at 130.

[21] *Id.* at 136.

[22] *Id.* at 112, 118.

[23] *Id.* at 130. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 2312 (1994).

disposed of their takings claim regardless of any consideration of the role of TDRs.[24]

In the case at bar, by contrast, Mrs. Suitum is prohibited from making any beneficial use whatsoever of her land. App. 88. Her primary expectation--the right to build a personal residence on her residential subdivision lot--has been completely frustrated. App. 2, 88. TRPA's regulations provide for no hardship procedures, and in fact are predicated on the assumption that they will in every case deprive owners such as Mrs. Suitum of all beneficial use of their property. App. 26-27, 88-89. Finally, TRPA has not established through any sort of individualized determination that Mrs. Suitum's proposed construction of a single-family residence on her subdivision lot would have any effect whatsoever on the water clarity of Lake Tahoe.[25] These crucial distinctions suggest that, if the *Penn Central* Court heard Mrs. Suitum's claim on the merits, it would promptly determine that TRPA's actions have effected a regulatory taking. At a minimum, it is fair to say that *none* of the factors cited as relevant to takings liability in *Penn Central* would be found to favor TRPA in the present case.

C. The *Penn Central* Court Specifically Noted That--Regardless of the Availability of TDRs--a Taking Would Be Found if the Regulation "Make[s] an Ordinary Building Lot Wholly Useless"

TRPA and its amici mischaracterize *Penn Central* as holding that the mere availability of TDRs insulates a regulatory scheme from a takings challenge, or at least extricates it from the per se, categorical takings analysis of *Lucas v. South Carolina Coastal Council*.[26] In fact, however, the majority opinion in *Penn Central* specifically cites to the following passage from *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908):

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[24] Respected constitutional commentators have observed that, because Penn Central admitted it was able to earn a reasonable return on its property irrespective of the availability of TDRs, the impact of the landmarks law "by definition could not rise to the level of a taking." Charles M. Haar and Jerold S. Kayden, LANDMARK JUSTICE 37 (1989). *Accord*, Daniel L. Mandelker, LAND USE LAW § 2.19 (1982).

[25] See *infra*, Section III.

[26] *E.g.*, Resp. Brf. at 33; Brief for the United States at 17.

> [T]he police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as ***to make an ordinary building lot wholly useless,*** the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.[27]

In the case at bar, TRPA's regulation of Mrs. Suitum's property has had precisely the effect of making "an ordinary building lot wholly useless." By citing the above passage in *Penn Central*, this Court anticipated *Lucas* by recognizing that such an extreme regulatory impact would constitute a per se, categorical taking *regardless* of the availability of TDRs.

Confirming this analysis, the majority opinion in *Penn Central* carefully noted that "nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal."[28] Had all construction activity been banned, as TRPA has done in the case at bar, a reasonable inference is that the *Penn Central* Court would have found a taking.

D. Any Relevance of New York City's TDRs to the Merits of Penn Central's Taking Claim Stemmed from the Fact That Penn Central Could Make Use of the TDRs to Develop Its Own Property

TRPA and many of its amici misleadingly cite to a fragment of a sentence in *Penn Central* to the effect that, under the facts of that case, New York City's TDRs "undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of the regulation."[29] Interestingly, TRPA and its supporters excise the first clause of this sentence, in which the Court clearly signals that, if a taking *had* been found under the facts of *Penn Central*, the mere

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[27] *Id.* at 355 (emphasis added); *cited in Penn Central*, 438 U.S. at 128.

[28] 438 U.S. at 137 (emphasis in original).

[29] 438 U.S. at 137, *quoted in, e.g.*, Resp. Brf. at 33; Brief of the City of New York at 4.

availability of TDRs would not have saved the offending regulations.[30] Leaving that point aside, however, we must ask what the Court meant by saying the transfer of Penn Central's development rights could "mitigate" the economic burden of the landmarks law.

TRPA leaps to the conclusion that the cited sentence fragment means that "*the value of TDRs*" is "relevant to the question of whether a 'taking' has occurred in the first instance." Resp. Brf. at 33 (emphasis added). Similarly, the amicus brief for the United States argues that this fragment amounts to an "unequivocal holding" that the "existence *and value*" of TDRs must be considered in determining takings liability.[31] Neither TRPA nor its amici seem concerned that the cited passage does not mention *the value* of the TDRs at all.

The answer to this puzzle is found two sentences earlier in the opinion, where the Court notes that Penn Central's right to develop its property had not been extinguished; rather, the firm's development activity could be transferred

> to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings.[32]

Does this mean, as TRPA contends, that Penn Central was required to scurry about, locate the owners of those eight buildings, and see how much could be realized from the sale of TDRs? Not at all. The key point is that ***Penn Central itself owned all eight of those buildings!***[33] The development the city would not permit over Grand Central Terminal could simply be shifted to another of the plaintiffs' properties in the same part of Manhattan. This is the "mitigation" to which the Court referred; in exchange for not placing an office tower over the Terminal, Penn Central would be allowed to exceed preexisting zoning restrictions for further development of the

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[30] The omitted text reads: "While these rights may well not have constituted 'just compensation' ***if a 'taking' had occurred*** ...." 438 U.S. at 137 (emphasis added).

[31] Brief for the United States at 17 (emphasis added).

[32] 438 U.S. at 137.

[33] *Id.* at 115.

Commodore Hotel, or other of its commercial real estate holdings! It is in this sense--and this sense only--that participating in the TDR program could be considered a "use" of Penn Central's property.

The equivalent "mitigation" in the case at bar would be a provision that, while Mrs. Suitum might not be allowed to build a house abutting the ditch at the rear of her property, she could instead build a larger one near the front of her lot, which would present no danger of increased sedimentation to Lake Tahoe.

That, of course, is not what TRPA has done. Nothing in *Penn Central* suggests that regulations that eliminate all beneficial use of residential property can be "mitigated" by throwing a handful of chits on the table and demanding that the victimized property owner attempt to find a buyer for them.

III

BUILDING A PRIVATE RESIDENCE ON A RESIDENTIAL SUBDIVISION LOT IS NOT AKIN TO A NUISANCE, AND IN FACT THERE HAS BEEN NO INDIVIDUALIZED DETERMINATION THAT MRS. SUITUM'S PLANNED CONSTRUCTION WOULD HAVE ANY ADVERSE ENVIRONMENTAL CONSEQUENCES WHATSOEVER

Even granting that Mrs. Suitum has been deprived of all beneficial use of her property, TRPA's amici argue that she nonetheless has no claim for a categorical taking under *Lucas* because her construction of a personal residence would be considered a "nuisance" subject to abatement under state law.[34] Mrs. Suitum's proposed construction of a retirement home, essentially identical to those already filling the Mill Creek Estates residential subdivision, is described as "a menace,"[35] "harmful to the health, morals, or safety

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[34] *E.g.*, Brief of the States, Nevada, *et al.*, at 11-17.

[35] *Id.* at 13.

of the public,"[36] "inflict[ing] injury upon the community,"[37] and "spread[ing] contamination."[38]

As a threshold matter, it is curious to note that these profoundly deleterious consequences would apparently accrue only to Mrs. Suitum's *private* development of her own property. *Governmental* development of the same land would seemingly be free of adverse environmental effects.[39] Even accepting the implied premise that only private development of Mrs. Suitum's lot would comprise a nuisance, however, this argument would prove too much. If Mrs. Suitum's construction of a single-family residence in the midst of a built-out subdivision would come under this Court's "nuisance exception" to the *Lucas* doctrine, then so would David Lucas' construction of two such homes under virtually identical circumstances. Because the *Lucas* exception did not apply to Mr. Lucas himself, it must be equally inapplicable to Mrs. Suitum.[40]

In any event, assertions that the construction of Mrs. Suitum's home would have adverse environmental impacts on Lake Tahoe are not supported by the record. The amicus brief of the State of Nevada, *et al.*, claims it is "undisputed" that there is a "causal relationship" between the construction of Mrs. Suitum's retirement home and "the pollution of Lake Tahoe's unique waters."[41] The brief of Pete Wilson, *et al.*, merely asserts that the "development of the petitioner's

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[36] *Id.*

[37] *Id.*

[38] *Id.* at 18.

[39] According to TRPA's Code of Ordinances, land in a Stream Environment Zone will support no new *private* land coverage or permanent land disturbance whatsoever, but may be used for public recreation facilities or public service facilities. App. 26-27.

[40] On remand from this Court the Supreme Court of South Carolina found that no common law basis existed whereby the Coastal Council could "abate" the construction of David Lucas' home as a nuisance. *Lucas v. South Carolina Coastal Council*, 309 S.C. 424, 427, 424 S.E.2d 484, 486 (1992). In its present amicus brief, the State of Nevada cites to no case or statute of that State under which building a personal residence in a residential subdivision has ever been found to comprise a nuisance.

[41] Brief of States, Nevada, *et al.*, at 17.

lot" would "seriously impair water quality.[42] Neither amici cite to any finding in the record supporting these claims.[43] Mrs. Suitum has disputed from the outset that TRPA's prohibition of her planned construction of a single-family residence on a flat lot in the midst of an established, built-out subdivision would substantially advance TRPA's regulatory objective of preserving the water clarity of Lake Tahoe.[44] At no time has TRPA made any individualized determination that the construction of Mrs. Suitum's home, employing appropriate technology and mitigation procedures, would cause so much as a single atom of nitrogen to tumble into the ditch 60 yards to the rear of her front property line and be borne thence to the lake.[45] Because there has been no such determination, the record in this case does not support assertions that the proposed construction of Mrs. Suitum's home would have any adverse environmental consequences at all--much less approach a common law nuisance.

IV

THE RECORD IN THIS CASE IS SUFFICIENT TO ESTABLISH A CATEGORICAL TAKING OF MRS. SUITUM'S PROPERTY UNDER *LUCAS v. SOUTH CAROLINA COASTAL COUNCIL*

The facts of this case are substantially identical to those of *Lucas v. South Carolina Coastal Council*, wherein this Court found a regulation that deprives an owner of all beneficial use of her land comprises a "categorical" or per se taking.[46] TRPA and its amici mischaracterize *Lucas* as requiring deprivation of "all economic

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[42] Wilson Brf. at 25.

[43] TRPA itself is more circumspect on this point, noting only that Mrs. Suitum does not deny that "development of SEZ properties," in general, could have adverse environmental impacts. Resp. Brf. at 45. Such a denial would of course amount to a *facial* challenge to TRPA's regulations, which is not raised by this litigation.

[44] Complaint, App. 4.

[45] TRPA has never found that Mrs. Suitum's proposed construction plans would cause any specific adverse impacts; instead, the agency's position is that development of property *like* Mrs. Suitum's is "*most likely* to result in significant degradation" of water clarity. Resp. Brf. at 5.

[46] 505 U.S. at 1018.

value" to establish a taking, and insist that "use" means "economic value" for purposes of applying the Takings Clause to the agency's prohibition of any beneficial use of Mrs. Suitum's land. Resp. Brf. at 34-36. Within this misguided framework, TRPA then argues that the monetary value of its administrative credits (if any) must be taken into account as a "use" of Mrs. Suitum's property in determining takings liability under *Lucas*. *Id.*

The categorical rule expressed in *Lucas* originated as the second prong of the two-part test for regulatory takings set forth in *Agins v. City of Tiburon*, 447 U.S. 255 (1980):

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable ***use of his land***.[47]

This formulation has been frequently repeated in the same words, emphasizing that the takings inquiry focuses on the owner's ability to put the land to beneficial, productive *use*. This Court's references in *Lucas* to loss of "value" merely reflects the fact that the trial court in that case *had determined* that David Lucas' property was rendered "valueless." 505 U.S. at 1020. This Court has never *required* a showing of elimination of all value to trigger a categorical taking for the deprivation of all beneficial use of property.[48] Indeed, as was recently reaffirmed in *Youpee v. Babbitt*, ___ U.S. ___, 1997 WL 17839 (1997), takings liability can be incurred by the complete abrogation of any significant "strand" in the bundle of rights comprising ownership.[49] Elimination of all economic value would be

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[47] *Id.* at 260 (emphasis added; citations omitted).

[48] TRPA not only misreads *Lucas* itself but also misconstrues sources cited in the opinion. For example, TRPA puts a 20th Century accountant's gloss on Coke's famous maxim, "for what is the land but the profits thereof," Resp. Brf. at 35 n.24. However, Coke was discussing estates of land at 17th Century common law, in which context a "profit" signified a specific beneficial use of the land, *i.e.*, its employment in "vesture, herbage, trees, [or] mines." E. Coke, 1 Institutes of the Laws of England, ch.1, § 1(4)(g). An accurate contemporary paraphrase of Coke would therefore be, "for what is the land but the beneficial use thereof"?

[49] *Accord, Hodel v. Irving*, 481 U.S. 704, 716-17 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

a special case of this general principle--a sufficient, but not a necessary, condition for a categorical taking.

Even a value-based takings inquiry, moreover, must be directed to the regulation's effect on the inherent utility of the land itself, *not* to the purported value of unrelated assets the state forces upon the landowner in the form of a coerced "exchange." As noted above, TRPA's claim that any resale value of its credits should offset the agency's liability for a taking rests entirely on a mistaken reading of *Penn Central*. Resp. Brf. at 32-33. Unlike the TDRs in that case, which actually facilitated more intensive development of the plaintiffs' real property than was otherwise possible under preexisting zoning,[50] TRPA's credits have no mitigating effect whatsoever upon the agency's outright prohibition of any beneficial use of Mrs. Suitum's property. Whether the credits in fact have economic value is for a trial court to determine. Regardless of the outcome of this factual inquiry, however, TRPA's administrative coupons cannot reasonably be described as a "remaining use" of a parcel of land that has been sterilized of its only inherent utility to Mrs. Suitum--serving as a locus for her personal residence.

The record in this case is sufficient to establish takings liability under *Lucas*, and the most appropriate disposition at this stage would be for this Court to so find and remand to determine whether TRPA wishes to limit its liability to damages for a *temporary* taking by allowing Mrs. Suitum to proceed with the construction of her retirement home.

V

THIS COURT SHOULD REJECT THE VIEW THAT PRIVATE OWNERSHIP RIGHTS ARE MERE PECUNIARY INTERESTS THAT CAN BE "REPLACED" BY BUREAUCRATIC FIAT WITHOUT TRIGGERING THE PROTECTIONS OF THE TAKINGS CLAUSE

The amicus brief of the City of New York correctly identifies the nature and importance of the underlying dispute before this Court

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[50] 438 U.S. at 137.

when it says, "[a]t issue in this case are two incompatible conceptions of real property."[51] Mrs. Suitum agrees with the city that

> [i]mplicit in petitioner's argument is the contention that the property she wishes to build on has a unique, intrinsic value to her for which any return is irrelevant.[52]

However, Mrs. Suitum disputes that this view of residential property ownership is "idiosyncratic."[53]

TRPA proudly asserts that its regulations have "replace[d] one property rights regime ... with another more suitable regime." Resp. Brf. at 38. This "more suitable" arrangement is one of bureaucratic command and control, where the "waste and inefficiency" of individual ownership rights are eliminated in favor of an omnipotent, centralized, regulatory directorate. *Id.* at 47. TRPA's self-proclaimed "replacement" (*i.e.*, nullification) of traditional Western concepts of ownership mirrors, at the macro level, its so-called "enhancement" of Mrs. Suitum's property by forcibly exchanging its credits for her right to a home on her own land. Resp. Brf. at 40-41. At both levels, TRPA's position relies on trivializing the values inherent in private property ownership in favor of a deficient concept of rights that is wholly reducible to pecuniary terms.

Thus, Mrs. Suitum's exercise of her personal autonomy and dominion by realizing her longtime dream of owning a retirement home on her own land is contemptuously dismissed as "secur[ing] economic return to herself"[54] or "reaping the financial rewards of land ownership."[55] TRPA acknowledges no injury from the loss of Mrs. Suitum's ownership rights *per se*, because it is the agency's position that property owners have no rights or interests under the Constitution that are not completely quantifiable and reducible to cash. Accordingly, Mrs. Suitum's prospective loss of her retirement home warrants no more than a cavalier aside: monetary compensation

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[51] Brief of Amicus Curiae City of New York at 14.

[52] *Id.* at 13.

[53] *Id.*

[54] Resp. Brf. at 36.

[55] Brief of Dr. James Nicholas, *et al.* (Nicholas Brf.), at 3.

"will be equally available in the future." Resp. Brf. at 26. Even if complying with the procedures demanded by the court below would result in permanently alienating Mrs. Suitum's right to build, she has no complaint, "any *economic injury* would remain." Resp. Brf. at 28 n.19

The *Lucas* majority recognized that the deprivation of all beneficial use of one's property is, "from the landowner's point of view, the equivalent of a physical appropriation."[56] This comparison highlights what the owner loses under regulations such as TRPA's: that measure of personal dominion and rightful autonomy that is the essence of property ownership. The fact that money damages may be awarded as the *remedy* for violations of constitutionally protected rights to life, liberty, and property does not imply that the rights themselves are merely pecuniary interests. TRPA's ham-fisted annihilation of Mrs. Suitum's right to the peaceful use and enjoyment of her retirement home diminishes her as a person. The agency's refusal or inability to recognize this fact provides a chilling illustration of the dehumanizing aspect of unrestrained statism.

Despite TRPA's assertion that its credits are "enhancements" to Mrs. Suitum's property because it has decreed them to be so,[57] these administrative contrivances were not part of the bundle of rights Mrs. Suitum acquired with her retirement homesite and did not enter into her reasonable expectations regarding the use of her property.[58] Under the Takings Clause, TRPA cannot simply "replace" Mrs. Suitum's rights with its bundle of credits, any more than it can "replace" a tradition of private ownership tracing back to Magna Carta with the "more suitable" framework of the TRPA Code of Ordinances.

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[56] 505 U.S. at 1017.

[57] Resp. Brf. at 23, 37, 40.

[58] The difficulty with TRPA's position is exemplified by the claim that Mrs. Suitum's reasonable expectations should be equated with $4,500 in cash, the amount she allegedly paid for her land. Brief Amicus Curiae of the League to Save Lake Tahoe at 18, 19, 27. In fact, however, Mrs. Suitum and her late husband acquired the Incline Village lot in exchange for a home in California that had previously been their personal residence. *See* Plaintiff's Answers to Interrogatories, Exhibit "A" to Opposition to Joint Motion to Dismiss, CR 52.

In TRPA's view, Mrs. Suitum's legitimate interests extend no farther than "preserving her investment in the area;"[59] her ownership rights reduce to nothing more than an "entitlement to an equitable share of the community's total development potential"[60]--which could of course be zero, if so proclaimed by a regulatory directive. This cramped and sterile notion of constitutional rights, which has informed all of TRPA's actions and decisions in its dealings with Mrs. Suitum, must be repudiated by this Court.

It may be true, as TRPA says, that the Constitution does not enact the theories of Friedrich Hayek,[61] but neither does it enact those of Friedrich Engels. TRPA has imposed enough suffering on Mrs. Suitum in pursuit of what it perceives as its regulatory mission. The agency's extinguishment of all beneficial use of Mrs. Suitum's property, evident from the record of this case as it now stands, effects a categorical regulatory taking under *Lucas* that is not only ripe but cries out for review.

CONCLUSION

For all the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be REVERSED.

DATED: February, 1997.

WM. PATTERSON CASHILL
410 California Avenue
Reno, Nevada 89509
Telephone: (702) 334-4444

ROBIN L. RIVETT
*R. S. RADFORD
VICTOR J. WOLSKI
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Petitioner

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[59] Brief of the National League of Cities, *et al.*, at 25.

[60] Nicholas Brf. at 3.

[61] Resp. Brf. at 49.